

IN THE CIRCUIT COURT OF THE UNITED STATES
WESTERN DISTRICT OF VIRGINIA.

1899
1900

Samuel Ford and William C. Smith, individually
and on behalf of such stockholders of the
Berliner Gramophone Company as may join in
this action.

Plaintiffs

vs.

BERLINER GRAMOPHONE COMPANY,

Defendant.

IN EQUITY.

The separate answer of the Berliner Gramophone Company, to the
Bill of Complaint^{or} filed in the above named cause.

This Respondent reserving to itself the right of exception to
said Bill, on account of the many errors and mis-statements therein
contained, for answer thereto, or such parts thereof, as it is advise
ed that it is material for it to answer unto, answering says:-

First. It admits as true the allegations of paragraph 1,
of the Bill.

Second. Answering the second paragraph, your Respondent de-
nies that the Complainant, William C. Smith was at the time of the
filing of the Bill in this case, a shareholder of the Berliner
Gramophone Company, nam d as Defendant in this suit, and it is
likewise denied "that this suit is not brought as a collusive suit
to confer on a Court of the United States jurisdiction of a case of
which it would not otherwise have cognizance," and as to all of the
matters and things alleged in paragraph two of the bill, this de-
fendant calls for strict proof.

Third. This defendant admits that Samuel Ford, another
of the complainants in this suit, has been a stockholder of this
defendant Company, but whether he holds said stock now or did
hold the same at the time of the institution of this suit,, this de-
fendant is not advised and as to this fact strict proof is required.

the allegation,

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"that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance," is denied and on the contrary, this defendant is sufficiently informed to believe, and therefore to aver that this suit was instituted by the said Ford, at the instigation and for the benefit and supposed advantage of one Frank Seaman, between whom and the said Ford there has lately existed close and it is believed, confidential relations.

Fourth. This defendant admits as true the averments contained in the Fourth, Fifth, Sixth and Seventh paragraphs of the Bill.

Fifth. The averments and allegations contained in Paragraph Eighth of the Complainant's bill, are distinctly denied, except so far as this denial is qualified by statement of the facts in respect of the matters and things averred in said paragraph. This defendant says that it was not a party to and had nothing to do with the alleged transfer or assignment by any of its stockholders unto certain persons of their shares of stock in this defendant company, on a Voting Trust or otherwise, nor did it take any part in, or have anything to do with the taking and receiving by said stockholders or any of them, in exchange for their shares of stock, Trust or other certificates.

When the Berliner Gramophone Company was organized in the Fall of 1895, the persons interested in organizing the Company, of whom the plaintiff, Samuel Ford was one, considered what means should be adopted to secure as well as possible the payment of the heavy royalty to the United States Gramophone Company, which the Company would be required to earn and pay in order to comply with the terms made by the United States Gramophone Company; and it was accordingly provided in the subscription contract that a majority of the total capital stock of the Company should, for the purpose of securing the performance of the obligations of the Berliner Gramophone Company to the United States Gramophone Company, be placed in the hands of three Trustees to hold and vote as security for the performance of all the said obligations, until the sum of \$ 75,000 Dollars in royalties should be paid. The plaintiff,

Thereupon, almost immediately, viz., on the first day of November, A. D., 1895, an agreement defining the terms of the proposed trust and constituting, according to the subscription agreement, Thomas L. Latta, Joseph Goldsmith and Thomas S. Parvin, Trustees, was executed, and in this agreement it was declared to be the duty of the said Trustees to hold the said stock and vote the same at all meetings of the said Berliner Gramophone Company, as security for the performance of all the obligations contained in three agreements, viz.,

2 September, 1895, between the United States Gramophone Company and W. C. Jones; 2 September, 1895, between Emil Berliner and W. C. Jones; and 4 October, 1895, between the United States Gramophone Company and W. C. Jones (being the contracts ~~being~~ mentioned in the Bill aforesaid), until the United States Gramophone Company has received in royalties under the said agreement the sum of \$75,000 Dollars. A copy of this agreement of 1895 is herewith filed and marked exhibit "A". The said Trustees received the said stock and issued to the persons who had been subscribers to the subscription agreement the Trustees' Certificates, in lieu of stock certificates, and representing the interests of the persons to whom they were issued in the stock issued to and held by the Trustees. Among the persons who received such Trustees' Certificates under the said agreement of 1895 was the Plaintiff, Samuel Ford, who held his said Trustees' Certificate during the entire period of the said Agreement of 1895, and upon the expiration of the period of the said Agreement of 1895, in the fall of 1898, received, in lieu thereof, a stock certificate or certificates for the number of shares to which he was entitled. During the period of the said Agreement of 1895, the Plaintiff Samuel Ford made no objection to the agreement, and, in fact, as he was a party to the formation of it, it was not reasonable to expect that he should object. During the period of the said Agreement of 1895, the Berliner Gramophone Company began to be successful in business, and at the expiration of the Agreement of 1895, in the fall of 1898, the Berliner Gramophone Company had attained a degree of prosperity theretofore unprecedented. All the stockholders of the company shared in this prosperity according to their respective holdings of stock.

Soon after the expiration of the said Agreement of 1895, numerous holders of the stock of the Berliner Gramophone Company, after much consideration and discussion, determined to enter into another agreement for the same purpose as the Agreement of 1895, and accordingly placed their stock in the hands of Thomas S. Parvin, Joseph Goldsmith and Thomas L. Latta, as Trustees to vote the said stock in all elections and on all questions proposed at all meetings of the stock holders of the said Berliner Gramophone Company, in such manner as shall, in their unanimous opinion, best promote and insure the performance of all the obligations contained in the said three Agreements and assumed by the Berliner Gramophone Company. These stockholders signed an Agreement which was dated 1 May, 1899, and to which the defendant, the Berliner Gramophone Company was not a party, in which the purposes of the arrangement and the duties of the three Trustees were defined. A stockholder who was a party to this agreement of 1899 has furnished a copy of it, which is hereto attached and marked Exhibit "B". This Agreement of 1899 is the so-called "Voting Trust" of which the Plaintiffs, Ford and Smith, complain in their bill. The purposes of the said Agreement of 1899 are the same as the purposes of the said Agreement of 1895, which the Plaintiff Samuel Ford joined in arranging, and under which he held Trustees' Certificates. The Trustees in the said Agreement of 1899 were the same persons who were the Trustees in the said Agreement of 1895, and in ~~xxxx~~ the appointment of whom the plaintiff Samuel Ford concurred in 1895. In fact, the purpose and effect of the said Agreement of 1899 were the same as those of the said Agreement of 1895, and both of the said Agreements were to promote the best interests of the Berliner Gramophone Company and all its stockholders as contemplated in the original organization of the Company, to which the plaintiff Ford was a party. There is not, and never has been any agreement or understanding that the stock held by the Trustees in the said Agreement of 1899 should be voted in the interest of the majority stockholders or against the interests of any of the stockholders of the Company. Neither the transfers of stock to the said Trustees or the Trusts themselves were

were administered solely for the benefit of the Berliner Gramophone Company and all its stockholders. The said Trustees have by their vote continued in office from the organization of the Company to the present time the original Board of Directors almost unchanged and the same President and other officers of the Company,-- except at the annual meeting in the ~~fall~~ of 1898, when the Agreement of 1895 had expired, and the Agreement of 1899 had not been executed. At that meeting, 60 individual stockholders, holding together 7171 1/2 shares (out of the total outstanding capital of 7642 1/2 shares) were present in person and by proxy, and by almost unanimous vote re-elected the same administration. The only votes cast at that meeting against the re-election of the same administration were those cast by the Plaintiff Samuel Ford, who voted his 150 shares for himself and four others, outside the old Board, and for two of the old Board. So that, of the seven members of the old Board re-elected at that meeting, two (one of whom was the President, Thomas S. Parvin) received the unanimous vote of 60 stockholders holding 7171 1/2 shares, and the remaining five received the vote of 7021 1/2 shares held by 59 individual stockholders, while the Plaintiff Samuel Ford and four others received the vote of 150 shares, being the shares of the Plaintiff Samuel Ford. Under this administration thus re-elected in 1898 by the votes of all the 60 stockholders voting at the meeting (except the plaintiff Samuel Ford) and subsequently re-elected at the annual meetings of 1899 and 1900, the defendant company has been so conducted that it has paid in royalties to the United States Gramophone Company more than \$196,000, has paid in dividends to its stockholders in cash almost as much as their original investment, and has accumulated resources in cash, manufactured goods on hand and other assets amounting to more than \$ 60,000. During this administration the stock of the company has constantly increased in value. So well satisfied is the Plaintiff Samuel Ford with his investment in the stock of the said Company and with the manner in which the Company's affairs have been administered that, very recently, he has refused to accept less than \$50 per share for

stock which originally cost him only \$6.66 per share, and on which he has received \$6.00 per share in dividends, and has even stated that he named the price \$50, as a personal favor and would not accept from others less than \$75 per share. This defendant repeats that it had nothing to do with the said Agreement of 1899 and is not a party to it. This defendant shows, however, that the said Agreement of 1899 was based upon a valuable consideration and was executed for entirely legitimate and lawful purposes as this defendant is informed and believes. This defendant is advised that the said agreement, a copy of which is herewith filed as aforesaid, cannot be made the subject of attack in this suit until, if then, the Trustees under the said agreement and the stockholders who have signed and executed it, are brought before

this Court in this or some other proper proceeding, by due and legal process of law.

Sixth. This Defendant denies the allegation in the Ninth paragraph of the Bill, "That the existence of said (alleged) Voting-trust has only just come to the knowledge of your Orators or either of them, and on the contrary this defendant says that the Complainant, Ford, had full knowledge of the said agreement of 1899 (dated May 1st 1899) as early as June 22nd, 1899, as will appear by a letter addressed to him on that day by Thomas S. Parvin &c. Trustees, a copy of which has been furnished to this Defendant and is herewith filed, marked "Exhibit C." which letter this defendant avers was received by said Ford.

This Defendant does not know that the Complainants, or either of them, participated in the said agreement, nor does it know that they or either of them ratified or consented thereto, except so far as their knowledge of said agreement and their silent acquiescence therein, will make them participants in the agreement itself or ratifiers thereof.

Seventh. This Defendant denies each and every allegation contained in the Tenth paragraph of the Bill. It is not true, "that through and by virtue of said (alleged) Voting Trust, the management and control of the affairs of this Defendant Company has been kept and maintained and will be kept and maintained in the hands of the present Officers and Directors, who are engaged in managing the business of said Corporation for their own individual benefit and not for the benefit or in the interest of said Defendant Corporation, or your Orators."

It is not true that the Officers and Directors of this Defendant Company have managed its affairs for their personal or individual or joint benefit or interest, but on the contrary their management has in all respects been strictly in the best interests of all of the stockholders of the Company. Their administration has been the subject of and always open to the inspection of the stockholders at their regular annual meeting, and so far as this Defendant Company knows and believes, their said administration and management have met with the approval of the stockholders. At the annual meeting of the stockholders, held Oct. 3rd, 1899, there were present Six Thousand, three hundred and ninety-five shares, out of a total issue of Seven thousand, three hundred and forty-three shares. Of this number so present, Four thousand, three hundred and sixty-one shares were represented by the Trustees under the agreement with certain stockholders, (exhibit B) and the remaining Two thousand and thirty-four shares were represented in person or by proxy (other than the said trustees) and the whole number of shares, so present and represented voted unanimously for the election of the present Board of Directors and to approve the management of the affairs of the Company for the preceding year.

Eighth. This defendant denies the averment of paragraph Eleven of the Bill, and on the contrary it says that it, this Defendant, has a factory where it manufactures Gramophones and the various appliances and accessories belonging thereto. It admits that, like almost every other manufacturer, it has at times purchased from other manufacturers or dealers parts or pieces used in a complete Gramophone.

Ninth. This Defendant denies, as absolutely untrue, each and

every allegation and statement contained in the Twelfth paragraph of the Bill, and it likewise denies, each and every averment contained in the Thirteenth, Fourteenth and Fifteenth paragraphs of the Bill.

Tenth. In further answer to the said paragraphs Fourteen and Fifteen and in answer to paragraphs Sixteen, Seventeen, Eighteen and Nineteen of the Bill, this Defendant says, that it is not true, as alleged, that the Officers of this Defendant Company, as such officers, entered into a contract or agreement of date June 5th, 1900, mentioned and described in the Plaintiff's Bill, but this Defendant says that it is true that certain of the stockholders or shareholders of this Defendant Company, holding a very large majority of the total issue of stock, believed to be as much as Seven thousand shares, did enter into an agreement with Charles Adamson for the purposes and on the conditions mentioned in said agreement.

This Defendant has been furnished by Thos. S. Parvin, a stockholder, with a copy of said agreement, and it files it with this answer, marked "exhibit D." This paper is dated June 5th 1900, and was executed and completed, in so far as it had been executed by the subscribing stockholders, long prior to the institution of this suit, but this Defendant is informed and believes it to be true, that each and every stockholder is to be offered the opportunity to sign said agreement and thereby to secure whatever benefit and advantages there may be derived therefrom. This defendant is further informed, believes and avers that the newly organized Company, called the Consolidated Talking Machine of America, has not issued any stock certificates, nor has it engaged or offered to engage in any business of any kind whatsoever. This Defendant does

not believe it is true, and therefore it denies the allegation, that there was any secrecy in or about the circulation of said agreement.

This Defendant denies that the officers and directors and managers of this Defendant Company proposed to enter into the agreement of June 5th, 1900, or did enter into and sign said agreement for any fraudulent or unlawful purpose. In further answer to paragraphs Seventeen and Eighteen of the Complainants' bill, this Defendant says it does not believe the allegation, that the Complainants only casually learned of the agreement of June 5th, 1900, nor does it believe, and therefore it denies the allegation, that the Complainants or either of them were "absolutely refused" any and all information concerning the said agreement. On the contrary whenever application has been made by any one of the stockholders of this Defendant Company, to any of its officers for information touching the affairs of this Defendant Company, such information has always been cheerfully and promptly furnished.

This Defendant is informed by Thos. S. Parvin that the Complainant Ford, wrote to him a letter, dated Sept. 12th 1900, filed with the Bill, and that promptly upon the receipt of said letter the said Parvin replied thereto in writing inviting the said Ford to call upon him and promising him if he would do so, to give him such information as the said Ford wanted and the said Parvin could furnish, and a copy of this letter, written by the said Thos. S. Parvin, in reply to the letter of Sept. 12th, is herewith filed marked "exhibit E." This Defendant is informed that Roland S. Morris, whose affidavit is attached to the Bill, called upon Frederick M. Leonard, the General Counsel of this Defendant Company

said Leonard informed the said Morris that the Defendant the Berliner Gramophone Company was not a party to the said agreement of June 5th, 1900 and that the said agreement or copies thereof had not been furnished to anyone; but at the same time he assured the said Morris that each and every stockholder of the Berliner Gramophone Company would be given an opportunity to sign the said agreement and thereby to receive whatever benefit there was to be derived therefrom.

Answering further the Nineteenth paragraph of the Complainant's Bill, this Defendant says that it was never contemplated that this Defendant should have or hold any stock in the Consolidated Talking Machine Company of America, and hence it is not true that its alleged stock was to be transferred to the said Consolidated Talking Machine Company of America, or to anyone else. This Defendant says that it was and is the purpose and intention of the management of this Defendant Company to continue its operations and business under the name, as heretofore of the Berliner Gramophone Company, and to keep and to preserve intact its organization for the purposes for which it was organized, and it never was intended or contemplated that this Defendant Company, in name or otherwise, was to be abandoned or discontinued.

This Defendant again denies distinctly that it has or ever had any connection with the contract of June 5th, 1900, and the said contract was in no particular the result of any conference, agreement or understanding between this Defendant and the United States Gramophone Company, and the Consolidated Talking Machine Company of America, or either or any of them.

Eleventh. This Defendant denies that as part of "said se-

cret, collusive and fraudulent conspiracy so entered into by such Officers and Managers, in derogation of their duty and of the rights and interests of the Defendant Corporation and of your Orators, said Officers, Directors and Agents have forfeited or about to forfeit their said contract or license with, from and under the United States Gramophone Company aforesaid," as averred in paragraph 20 of the Bill and this Defendant says that all of the charges of fraud or collusion or conspiracy or secrecy or unfairness, wherever stated in said Bill, are absolutely untrue.

This Defendant says it is true, as averred in the latter part of paragraph twenty, that a notice of forfeiture under and in pursuance of the terms of the contract between this Defendant Company and the United States Gramophone Company, has been given to this Defendant Company, but it denies that this notice has been given by reason of any fraud upon the part of this Defendant or in pursuance of any collusion or arrangement or understanding between the said U. S. Gramophone Company and this Defendant Company. A copy of the notice given to this Defendant Company by the United States Gramophone Company is herewith filed, marked "exhibit F. This notice was given without previous knowledge or any warning whatever. The Defendant and its counsel vigorously protested against the notice and the notice was rescinded by a resolution of the Board of Directors of the U. S. Gramophone Company, a copy of which is filed herewith, marked "exhibit G."

This Defendant, has to the full extent of its powers, fulfilled and performed all of its obligations under the contracts between it and the United States Gramophone Company. This Defendant says, that in order to utilize the said contracts to the fullest

advantage and to reap therefrom as much profit as possible, it entered into a contract on Oct. 10th, 1896, with one, Frank Seaman, whereby it gave to the said Frank Seaman on certain conditions and upon certain terms named in said contract, the exclusive right to buy all of the products of this Defendant's manufacture and all parts thereof, for a period of fifteen years in the entire territory of the United States, except the District of Columbia, a copy of this contract is herewith filed, marked "exhibit H." and is asked to be taken as a part of this Bill. This contract was made by the proper Officers and Directors of this Defendant Company, and with a knowledge of most if not all of the stockholders. So far as this Defendant knows there has never been any objection upon the part of said stockholders, or any of them, to the making of said contract.

This Defendant further says that the said contract in its most important and material features, has been broken by the said Frank Seaman and as a result thereof a litigation is now pending between this defendant and the said Frank Seaman. Since the beginning of the said litigation in June last between the said Seaman and this Defendant Company, the hands of this Defendant Company have been tied and its right to sell Gramophone and gramophone goods, has been restrained by an injunction so that this Defendant has been unable for the past three months or more to prosecute its business of manufacturing and selling Gramophones, by reason whereof its income has been cut off and it has been unable to pay to the United States Gramophone Company any royalties as provided for in the agreement between it and this Defendant Company; and so it is that this defendant says that it is through no default on its part that

it has been unable to meet the demand of the United States Gramophone Company made upon it.

This Defendant disclaims distinctly that any blame attaches to it by reason of any alleged default on its part under the contract with the United States Gramophone Company, and if there has been any failure to prosecute actively the gramophone business, which it does not admit, it is due solely to the fact that the said Frank Seaman has failed on his

part to carry out the contract of Oct. 10th, 1896.

Twelfth- It is denied that the officers, directors and agents of this defendant company have wilfully and fraudulently or otherwise refused to perform the terms of the contracts between it and the United States Gramophone Company except so far as hereinbefore stated and except so far as it has been rendered unable to do all that it desired to do because of the continued breach upon the part of the said Frank Seaman of his contract with this defendant company. If there should be worked a forfeiture of the license of this defendant company under these contracts with the United States Gramophone Company and if injury should be caused thereby, this defendant distinctly disclaims any responsibility therefor; for it repeats that if such results occur they will flow directly from the action of Frank Seaman, because of his failure to carry out his contract as hereinbefore mentioned. It is not true that a forfeiture of the license under the contracts with the United States Gramophone Company will enure to the great profit and advantage of the officers and directors of this defendant company nor is it true that said officers and directors, so far as this defendant is advised, have joined in any combination or arrangement from which could result any injury or disadvantage to the stockholders of this defendant company, nor is it true that said officers and directors, as such, have received or are about to receive stocks or any Consolidated company, either established or to be established.

Thirteenth. This defendant admits that it has closed its offices and its factory and had discharged its employees, and is not now engaged in business, as is alleged in paragraph twenty-two of the Bill, but it says that it has done so, not of its own motion, but in obedience to the injunctive order of June 25th 1900 in the suit of Frank Seaman against this Defendant Company, hereinbefore referred to. All of the remaining averments of paragraph twenty-two of the Bill are denied.

Fourteenth. The allegations of the twenty-third paragraph of the bill, are denied.

Fifteenth. This Defendant denies knowledge of any agreement, such as that mentioned in paragraph twenty-four of the Bill, except such as is mentioned hereinbefore.

Sixteenth. This Defendant admits that the profits of the Berliner Gramophone Company, during several years last past, have been large, and it denies that it has entered into any agreement or arrangement whereby said profits will be diminished.

Seventeenth. All of the averments of paragraph twenty-six of the Bill are denied.

And now having fully answered and denying each and every allegation contained in the Complainants' bill, not herein expressly admitted, this Defendant prays that the Court will deny the several prayers of the Complainants' Bill and will dismiss this Defendant with its reasonable costs and charges.

Signed by the Berliner Gramophone Company by Thos. S. Parvin President, attested by Max H. Biernbaum, Secretary, under the seal of said Company.

Marshall L. Formick BERLINER GRAMOPHONE COMPANY
Counsel for Respondent BY *Thos. S. Parvin*
PRESIDENT

Attest:

Max H. Biernbaum Secretary

County of Philadelphia,)
State of Pennsylvania) ss.

Thomas S. Parvin being duly sworn deposes and says that he is the President of the Berliner Gramophone Company, defendant above named, and that the matters and things set forth in the foregoing answer are true and correct in so far as they are within his own knowledge and in so far as they are not within his own knowledge, he believes them to be true.

Thos Parvin

Sworn and subscribed
to before me this 8th
day of October, A.D. 1900.

Wm J. Lyons,
Notary Public.